SUPREME COURT OF FLORIDA

INQUIRY CONCERNING A JUDGE:
CYNTHIA A. HOLLOWAY Case No. SC00-2226
No.: 00-143
_____/

JUDGE CYNTHIA A. HOLLOWAY'S
RESPONSE TO SHOW CAUSE ORDER

I. STATEMENT OF THE CASE AND FACTS

A. Contact with Judge Stoddard and Detective Yaratch

In February of 2000, the Tampa Police Department began an investigation of possible sexual misconduct by the biological father of a four-year old child.[1] This child's aunt, Cindy Tigert, is Judge Holloway's friend.[2] Through Judge Holloway's friendship with Ms. Tigert, Judge Holloway had known the child since she was a baby.[3]

A few days after the abuse allegations were made, Judge Holloway learned that no officer had yet spoken to the child or the pre-school teacher who had notified the authorities.[4] As a concerned family friend, Judge Holloway attempted to contact law enforcement to request that if an interview of the child was going to be conducted that it be done expeditiously.[5]

---

1 HT 309:6-15.

2 HT 520:5-12 and 526:19-21.

3 HT 101:20-23 and 635:23-626:5.

4 HT 643:4-9.

5 Judge Holloway's concerns about the lack of progress in the sexual abuse investigation are reasonable under the circumstances. Even Judge Stoddard testified that he had concerns regarding the objectivity of Detective Yaratch in investigating sexual abuse allegations. In fact, Judge Stoddard testified that he was struggling with whether he should recuse himself from the Adair v. Johnson custody proceedings before Judge Holloway ever contacted him due to his concerns on how his knowledge of similar abuse allegations involving Detective Yaratch would affect his judgment in the Adair proceedings. HT 86:15-87; 87:19; 91:6-22.

On February 24, 2000, Judge Holloway spoke with Detective Yaratch, the case investigator with the Tampa Police Department.[6] Judge Holloway told the detective that she did not want to discuss the facts of the case. However, Judge Holloway indicated that if the detective planned to interview the child at the Child Advocacy Center, she hoped that he would do so as soon as possible.[7] Judge Holloway did not say anything to intimidate, coerce or try to influence Detective Yaratch.[8]

Since the inception of these proceedings, Judge Holloway has admitted that her contact with Judge Stoddard on March 3, 2000, was entirely inappropriate. While the Hearing Panel found that her actions were understandable in that they were motivated by her concern for the well being of a child, this in no way excuses her conduct. Judge Holloway acknowledges this and has apologized to Judge Stoddard and the public. The unrefuted testimony

---

[6] HT 642:15.

[7] Holloway Testimony, HT 643:17-23. Detective Yaratch corroborated Judge Holloway's testimony regarding the contents of this phone conversation: "basically my understanding was that she was concerned about this case and that she requested an interview be conducted at the Child Advocacy Center with this child as soon as possible. She basically said that she didn't have anything to do with the case but that she was concerned that that needed to be done, that the child had actually stayed at her house on a couple of occasions but she didn't have anything more to do with it than that." Yaratch Testimony, HT 316:3-12.

[8] Yaratch Testimony, HT 338:2 - 339:17.

at trial was that she has been extremely remorseful about this conduct from the outset.[9]

However, Judge Holloway disagrees with the Investigative Panel's contentions that the contact with Judge Stoddard was the sole motivation for his recusal and that the child remained in shelter status for an extended period of time due to her actions. Fortunately, the Hearing Panel, after hearing Judge Stoddard's own testimony to the contrary and reviewing the transcripts in the child custody proceedings which are quite clear on the reasons for the protracted sheltering of the child, agreed with Judge Holloway that the Investigative Panel was wrong with respect to these issues.

B. **Deposition Testimony Regarding Contact with Stoddard**

On July 19, 2000, Mark Johnson took Judge Holloway's deposition. Judge Holloway assumed that her deposition was being taken because she had testified in the custody case on two previous occasions and a final hearing had been set for August of 2000.[10] Mr. Johnson assured Judge Holloway's counsel that this deposition was, in fact, being taken in order to prepare for the upcoming final hearing and was not being used to harass Judge Holloway.[11]

---

[9] Stoddard Testimony, HT 87:20-88:4; Holloway Testimony, HT 644:20-645:21; Padgett Testimony, HT 574:7-576:2.

[10] Alley Testimony; HT 755:11-18.

[11] Alley Testimony, HT 754:6 - 756:22.

Immediately prior to the deposition, Judge Holloway attended the funeral of Harry Lee Coe, III.[12] Judge Holloway explained to Mr. Johnson that she was upset[13], and her attorney requested that the deposition be rescheduled.[14] However. Mr. Johnson, having traveled from Washington, D.C., insisted on proceeding with the deposition as scheduled.

Mark Johnson had previously been very adversarial to Judge Holloway. On June 15, 1999, Mr. Johnson had a confrontation with Judge Holloway in a local restaurant.[15] His verbal and physical actions towards Judge Holloway were so threatening that an employee removed Mr. Johnson from the establishment. In addition, prior to this deposition, Mr. Johnson had told numerous people that he would "get" Judge Holloway's job.[16] Finally, Judge Holloway was aware that the JQC was conducting an investigation based upon a complaint that she assumed had been filed by Mr. Johnson.[17] However, based upon Mr. Johnson's assurances that his motives in taking this deposition

---

12 Holloway Testimony, HT 649:2-4.

13 Holloway Testimony, HT 651:11-14.

14 Alley Testimony, HT 779:14-17.

15 Holloway Testimony, HT 646:4 – 647:17; Kelley Testimony, HT 503:4-5.

16 Holloway Testimony, HT 645: 25 - 646:2; Alley Testimony, HT 754:16-20 and 785:17-21; B. Tigert Testimony, HT 523:3-11; C. Tigert Testimony, HT 534:8-10; R. Brooks Testimony, HT 589:16-21; and Adair Testimony, HT 121:9-12.

17 Holloway Testimony, HT 684:3-4.

were purely for the purpose of preparing for the Final Hearing in his custody case, Judge Holloway appeared for deposition and did not seek a protective order to prohibit her deposition from going forward or to limit, in advance, the scope of the deposition.[18]

During the deposition, Judge Holloway acknowledged that she or someone else had contacted law enforcement about the Adair case. Judge Holloway further stated that she did not recall whether or not she actually spoke to the Detective about the case, but that it was possible that she did.

Mr. Johnson asked Judge Holloway when she first learned that his daughter had been sheltered. Judge Holloway answered that she discovered that fact on a Saturday morning. Mr. Johnson then asked her if she did anything in response to that discovery. Judge Holloway truthfully answered that she did not recall being able to do anything at that point. Mr. Johnson then asked Judge Holloway whether she contacted Judge Stoddard. This question was asked immediately after questions that referenced Judge Holloway's knowledge and actions on the Saturday that the child was placed in shelter status. Based on the temporal relationship, the context, and the cadence of the questions, Judge Holloway assumed that this question, too, pertained to her actions on that same

---

[18] Alley Testimony, HT 759:24 - 760:15.

Saturday morning, and she answered that she had not contacted Judge Stoddard at that time.

Mr. Johnson subsequently asked Judge Holloway whether she had anything to do with Judge Stoddard's recusal from the custody proceedings. Judge Holloway's attorneys objected to this question as it was outside of the scope of permissible discovery for the Adair custody proceedings and constituted harassment of Judge Holloway. Judge Holloway did not answer this question on the advice of counsel, and Mr. Johnson never attempted to obtain a court order compelling her to answer questions relating to her contact with Judge Stoddard.

After the deposition had ended, Judge Holloway remembered that she had in fact spoken with Detective Yaratch.[19] Judge Holloway contacted her counsel later the same day that the deposition had taken place and informed him that she did recall the conversation after speaking with her Judicial Assistant.[20] Judge Holloway's counsel then began to prepare an errata sheet to include this information regarding the contact with Detective Yaratch.

Later, upon receipt of the deposition transcript, Judge Holloway's attorneys believed that a reader could misinterpret the time frame of Mr.

---

[19] Holloway Testimony, HT 766:11-767:17.

[20] Alley Testimony, HT 895:9-896:5; Holloway Testimony, HT 766:11-767:17; Wingate Testimony, HT 926:12-928:3.

Johnson's questions concerning whether she had contacted Judge Stoddard. It was for this reason that Judge Holloway clarified her answer as to the time frame.[21] Judge Holloway is adamant that a reasonable reading of the original deposition, read in context of the entire deposition, demonstrates that her testimony was truthful and responsive to Mr. Johnson's questions. In fact, every other person who was present at the deposition understood Mr. Johnson's questions in the same manner as Judge Holloway.[22] Accordingly, when Judge Holloway reviewed her deposition, she corrected her testimony concerning her contact with Detective Yaratch and clarified that her responses concerning her contact with Judge Stoddard pertained only to the Saturday morning when she learned of the child being sheltered.[23] The errata sheet was sent to the court reporter on August 8, 2000.[24] Subsequent to the deposition, Judge Holloway's counsel received correspondence from Mr. Johnson thanking Judge Holloway and her counsel for being so cooperative during the deposition.[25]

---

[21] Holloway Testimony, HT 658:14-659:5; Alley Testimony, HT 773:23–774:17.

[22] Holloway Testimony, HT 654:15-655:17; Alley Testimony, HT 765:12-768:25; R. Brooks Testimony, HT 586:4-588:16; Adair Testimony, HT 123:1-124:19.

[23] Holloway Testimony, HT 658:9-659:5.

[24] Alley Testimony, HT 780:18-21; Judge Holloway's Exhibit 8.

[25] Alley Testimony, HT 763:4-11.

C. Contact with Judge Essrig

On July 29, 1999, James T. Holloway, Esquire, Judge Holloway's brother, was scheduled for a final hearing in his uncontested divorce in front of Judge Katherine G. Essrig.[26] Judge Holloway was aware that her brother's final hearing was scheduled for that afternoon and she went to Judge Essrig's offices to see her brother.[27]

Mr. Holloway had an out-of-state flight scheduled for later that afternoon and was concerned that he would miss his flight.[28] When the hearing had been scheduled, Mr. Holloway thought that it was a hearing set just for his individual case, and did not learn until he arrived that it was actually a "cattle call" hearing of a number of uncontested cases involving lawyers and *pro se* litigants.[29] After waiting for a few minutes with Mr. Holloway outside the hearing room, Judge Holloway stuck her head inside of Judge Essrig's chambers and asked Judge Essrig whether she would be willing to hear Mr. Holloway's case next so that he would not miss his flight.[30] Judge Holloway spoke politely and in a normal tone of voice. Judge Essrig did not react negatively to Judge Holloway's

---

[26] Holloway Testimony, HT 659:8-660:12.
[27] Holloway Testimony, HT 660:9-661:15.
[28] Holloway Testimony, HT 664:22-665:1; 724:21-725:4.
[29] Holloway Testimony; HT 661:16-22; 663:1-12.
[30] HT 664:22-666:9.

request and agreed to call Mr. Holloway's case next so that he would not miss his flight.[31] Judge Essrig testified that she would have accommodated any lawyer or party that made the request and that such scheduling courtesies were routinely granted.[32]

II. ARGUMENT

A. SUMMARY OF ARGUMENT AND STANDARD OF REVIEW

The burden of proof of the Special Counsel is one of clear and convincing evidence.[33] In order to meet this burden, the Special Counsel was required to present the Hearing Panel with:

- Evidence that was credible;

---

[31] HT 666:2-9.

[32] HT 389:23-390:11; 393:18-394:16.

[33] In re Davey, 645 So. 2d 398 (Fla. 1994). "Because of the serious consequences attendant to a recommendation of reprimand or removal of a judge, the quantum of proof necessary to support such a recommendation must be clear and convincing. There must be more than a preponderance of the evidence, but the proof need not be beyond and to the exclusion of a reasonable doubt." Id. at 404**.** Clear and convincing evidence requires that evidence "must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of allegations sought to be established." Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983). The court further stated, "[T]he facts to which the witnesses testify must be distinctly remembered; the testimony must be clear, direct and weighty, and the witnesses must be lacking in confusion as to the facts at issue." Id.

- Testimony from witnesses whose recollections were clear and without confusion;
- Testimony based upon distinct memories of the witnesses; and
- Testimony that was precise and explicit.[34]

Ultimately, the evidence presented by the Special Counsel must be "of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth" of each of the charges sought to be proven.[35] The Hearing Panel's findings and recommendations fall far short of meeting this high standard.

It is disconcerting that the Hearing Panel could find that the evidence adduced was terribly conflicting, that the JQC's witnesses were not credible, and accept most of the evidence presented by Judge Holloway, and yet find in favor of the JQC on each of the charges and suggest a punishment for Judge Holloway that is unprecedented. In doing so, the Hearing Panel has misapplied Florida law; wholly ignored the unchallenged testimony of independent

---

[34] In re Davey, 645 So. 2d 398 (Fla. 1994). In considering testimony from this case, the Florida Supreme Court rejected the JQC's findings and noted that "[t]estimony before the Commission on this point is indecisive, confused and contradictory – a far cry from the level of proof required to establish a fact by clear and convincing evidence." Id. at 404.

[35] Id.

witnesses; and considered evidence that was excluded or should never have been permitted to be presented.

B. **THE HEARING PANEL'S FINDINGS OF FACT AND RECOMMENDATION OF GUILT WITH RESPECT TO THE DEPOSITION TESTIMONY AND ERRATA SHEET SHOULD BE REJECTED.**

The formal charges filed in this matter isolate the original deposition transcript from the errata sheet, which is patently unfair and contrary to the Florida Rules of Civil Procedure and applicable Florida law. During the hearing, over objection, Special Counsel directed Mark Johnson to read Judge Holloway's testimony from the deposition in Adair v. Johnson to the Hearing Panel without substituting her answers from the errata sheet.[36] Asking that that testimony be read without fully incorporating the errata sheet was as misleading as asking Mr. Johnson to paraphrase what might have been said or permitting him to make up answers that suited him and Special Counsel.

Unfortunately, the Hearing Panel's findings indicate that it, too, has accepted without question the same erroneous and illogical application of the law advocated by the Investigative Panel and the JQC's Special Counsel. Their steadfast insistence that the deposition testimony be read apart from the errata

---

[36] Johnson Testimony, HT 182:20-186:8.

sheet has eliminated the right of judges to read and correct their deposition testimony. There is no exception under Florida law creating special rules for testimony from judges nor should there be. Any experienced attorney knows that errata sheets are vital since mistakes in transcription, faulty memories, confusion from vague questions, and similar problems occur every single day in depositions. Given the JQC's position in these proceedings, every sitting judge needs to be extremely cautious in even honoring a subpoena to testify at deposition as any mistake or lack of recollection could result in disciplinary proceedings. Furthermore, if a judge does honor a subpoena and testifies in deposition, any efforts to correct errors or clarify testimony on an errata sheet or avail oneself of the protections for witnesses available under the Florida Rules of Civil Procedure should be undertaken with extreme caution as they may subject the judge to even more charges from the JQC.

The Florida Rules of Civil Procedure expressly permit a witness to review his deposition and make corrections, both to the form and substance of the testimony.[37] In Motel 6 Inc. v. Dowling,[38] the First District Court of Appeal, in an opinion of first impression in Florida, stated that:

---

[37] Rule 1.310(e), Florida Rules of Civil Procedure provides "any changes in form or substance that the witness wants to make shall be listed in writing by the officer with a statement of the reasons given by the witness for making the changes.

[38] 595 So. 2d 260 (Fla. 1st DCA, 1992)

Rule 1.310(e), Florida Rules of Civil Procedure, expressly permits a witness to review his deposition testimony and make corrections, in both the form and substance, to his testimony….

[T]o conclude that the deposition itself would be admissible, but not the errata sheet, would render meaningless the witness' right to review his deposition testimony. One of the reasons a witness reads his deposition is to make permissible corrections to his testimony. Once the changes are made, **they become a part of the deposition just as if the deponent gave the testimony while being examined**, and they can be read at trial just as any other part of the deposition is subject to use at trial. Further, although the issue of the use of errata sheets at trial is one of first impression in Florida, we note that our decision on this point is consistent with decisions of the federal courts and other state courts which have interpreted substantially similar statutes.[39] (emphasis added)

---

[39] Id. at 262.

In Motel 6, the party taking the deposition objected to use of the errata sheet, filed just two weeks before trial and **90 days** after the deposition was taken, due to its inability to cross-examine the witness. The First District rejected this spurious argument and commented:

> If the motel wished to cross-examine [the deponent] regarding the changes, the burden was on the motel to reopen the deposition. Counsel could have then asked questions which were made necessary by the changed answers, questions about the reasons the changes were made, and questions about where the changes originated, whether with the deponent or with his attorney. By availing itself of this remedy, the motel would have discovered, pretrial, whether the changed answers were the result of collusion, as the motel now charges, or were the result of improved memory.[40]

The Fourth District reached a similar result in Feltner v. Internationale Nederlanden Bank,[41] where it granted a request to reopen a deposition after the

---

[40] Id. at 262.

[41] 622 So.2d 123 (Fla. 4th DCA 1993).

deponent filed an errata sheet containing sixty-one changes to the deposition transcript. The Feltner court commented:

> Rule 1.310(e), Florida Rules of Civil Procedure permits a deposition witness to make changes "in form or substance" to a transcribed deposition by listing them in writing with the reasons given for making the changes. Like its federal counterpart, Federal Rule of Civil Procedure 30(e), the Florida rule places no limitations on the changes a deponent can make. Accordingly, the deponent can make changes of any nature, no matter how fundamental or substantial. However, if the changes are substantial, the opposing party can reopen a deposition to inquire about the changes.[42]

Mark Johnson never attempted to reopen Judge Holloway's deposition, although he certainly knew how to do so, even as a *pro se* litigant, as he did with at least one other witness in the child custody proceedings. Mark Johnson did not need the information about Judge Stoddard for his child custody proceedings.

The JQC had the burden of proving that Judge Holloway's testimony was false or misleading and that she intended it to be false or misleading at the time

---

[42] Id. at 124.

that it was given. "Rather than showing simply that the judge made an inaccurate or false statement under oath, the Commission must affirmatively show that the judge made a false statement, which he/she does not believe to be true."[43]

However, the Hearing Panel found that Judge Holloway did not "intentionally lie" in either her deposition testimony or on the errata sheet with respect to her contact with Judge Stoddard and Detective Yaratch.[44] As such, the only other way that the JQC could support its charge was to prove that any mistake or lack of recollection that Judge Holloway had at the time of the deposition was unreasonable. The Hearing Panel did not find that Judge Holloway's actions were unreasonable under the circumstances, so it should follow that Judge Holloway is not guilty of these charges.

Instead, however, the Hearing Panel has attempted to change the standard, and steadfastly contends that Judge Holloway's actions under the circumstances were "unacceptable" without making any findings as to the reasonableness of her conduct. While the Panel did find that Mr. Johnson's question "fairly called" for a response that admitted contact with Judge

---

[43] In re Davey, 645 So.2d at 407.

[44] Findings of Fact. "The Panel rejects the assertion that Judge Holloway intentionally lied in her deposition and then intentionally lied in her errata sheet."

Stoddard, there is no recitation to the record or any testimony in support of this finding.

Judge Holloway provided this Hearing Panel with a reasonable and rational explanation for her deposition testimony and the changes made on the errata sheet. The Hearing Panel has not rejected any of this testimony from Judge Holloway and others relating to her state of mind at the time of the deposition and the events that transpired afterwards with regard to the preparation of the errata sheet. However, it does not appear that the Hearing Panel has accepted this testimony either, since these facts would prevent the Hearing Panel from finding guilt on these charges.

The Hearing Panel has an obligation to explain to this Court why it ignored consistent testimony on this critical issue from Judge Holloway and three other witnesses. Even if Mark Johnson were a credible witness, his testimony on what he meant when he asked the deposition questions is irrelevant, since this Panel was supposed to look at the reasonableness of Judge Holloway's answers given how she understood the questions asked which can only be found through the testimony of Judge Holloway and others present at the deposition.

The Hearing Panel seems to be operating under a false presumption, advocated by the JQC's Special Counsel, that it was improper for Judge

Holloway to have intended not to answer questions relating to her contact with Judge Stoddard during her deposition. The Hearing Panel indicated that this refusal to answer certain questions was "unacceptable", and appears to underpin the Hearing Panel's assertion that her answers relating to contact with Judge Stoddard were "misleading" and improper.

This Hearing Panel was provided inaccurate statements of the applicable law on protective orders and the appropriateness of instructing witnesses not to answer. Rule 1.280(c) provides as follows:

> Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense that justice requires, including one of more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specific terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; . . . .

This rule protects all witnesses, even judges.

In hindsight, Judge Holloway certainly agrees that it would have been preferable for her counsel to seek a protective order from the court in advance of her deposition to limit the scope of inquiry into matters that were relevant to Mark Johnson's upcoming custody hearing. It is important to note, however, that Mark Johnson assured Judge Holloway's counsel that the deposition was solely for the purpose of preparing for the custody hearing and not to harass Judge Holloway.[45] Obviously, Mark Johnson was not credible then, just as the Hearing Panel found that he was not credible when testifying before the Panel. It is ironic that Special Counsel has been successful in convincing this Panel that Judge Holloway should have known that Mark Johnson was being dishonest as to his intentions and sought a protective order in advance of her deposition, while, at the same time, Special Counsel asked the Investigative Panel to accept Mark Johnson as being credible (which apparently they did in filing charges without any substantiation other than the allegations of Mark Johnson) and then asked this Hearing Panel to do the same (even in the face of overwhelming evidence to the contrary).

---

[45] Alley Testimony, HT 755:2-18.

Obviously, no one can anticipate all of the problems that might occur at a deposition. It is for this reason that the Rules of Civil Procedure provide another avenue for witnesses to protect themselves when they find that a deposition is not being conducted in good faith and is being used to annoy, embarrass, oppress, or unduly burden a witness. Rule 1.310(c) provides, in pertinent part: "A party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion under subdivision (d)." Rule 1.310(d) provides as follows:

> "At any time during the taking of the deposition, on motion of a part or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, or that objection and instruction to a deponent not to answer are being made in violation of rule 1.310(c), the court in which the action is pending or the circuit court where the deponent is taken may order the officer conducting the examination to case forthwith from taking the deposition or may limit the scope and manner of the taking of the deposition under rule 1.280(c)."

The Court Commentary for this Rule relating to the Protection of Parties and Witnesses notes:

> Abuse of the almost unlimited scope of examination permitted by Rule 1.280 is safeguarded against by orders made for the protection of parties and witnesses before the examination or production under this rule, **and** orders made during the examination under Rule 1.310 (emphasis added). . . .

The Commentary emphasizes that application for protection under these rules must be "seasonably" made, which means "as soon as the party or prospective witness learns of the need for a protective order."[46] Judge Holloway did seasonably make an application for protection under this rule when her counsel refused to permit her to answer questions relating to her contact with Judge Stoddard and Judge Stoddard's ultimate recusal from the custody case.[47] The Hearing Panel's dislike for these protections under the Rules of Civil Procedure or desire to have these rules not protect judges who are testifying as witnesses should be expressed to the Rules Committee when it solicits comment and not

---

[46] Rule 1.310, Florida Rules of Civil Procedure, 1967 Author's Comment.

[47] Holloway Deposition, JQC Hearing Exhibit 6 at p. 39, line 18; p. 41, line 19.

be used as a means to punish Judge Holloway for acting appropriately under the circumstances.

The Hearing Panel's findings with respect to the testimony on her contact with Detective Yaratch are also puzzling. Although the Panel found Judge Holloway guilty of giving misleading testimony relating to her contact with Detective Yaratch, there are no references to the transcript or comment on why the Panel made this finding. Both Detective Yaratch, the JQC's only witness, and Judge Holloway have testified consistently on the time and nature of this phone conversation.[48] Both have testified consistently that Judge Holloway was not trying to influence the detective, and that the contact was made due to concern for the child involved in the abuse investigation.[49]

The errata sheet was deemed "misleading" by the Hearing Panel because it was "incomplete", but the Hearing Panel has made absolutely no findings of fact as to what more should have been disclosed. There is also no legal support for the Hearing Panel's conclusion that a lack of completeness somehow equates to her answer being misleading.

---

[48] Yaratch Testimony, HT 338:20-339:17; Holloway Testimony, HT 642:17-643:9.

[49] Yaratch Testimony, HT 316:3-12; Holloway Testimony, HT 642:19-644:8.

Since there is no finding that Judge Holloway had an intent to deceive with respect to her telephone call with Detective Yaratach, there can be no finding of guilt on this charge. The fact that Detective Yaratch has testified more completely about the telephone conversation does not mean that Judge Holloway has done anything wrong. One would hope that a police officer testifying from his written police report would have a better ability to recite the specifics of a very brief phone call.

The bottom line is that the Hearing Panel has shown that even it only selectively misapplies the law on deposition testimony and errata sheets. The Hearing Panel's conclusions with respect to the deposition testimony and errata sheet regarding contact with Detective Yaratch are unsupported by the record, legally insufficient, and should be wholly disregarded by this Court. There is absolutely no factual support in the record for the Hearing Panel's assertion that Judge Holloway committed an ethical violation or did not respond reasonably in her deposition testimony or preparation of the errata sheet. Accordingly, this Court should ignore the Panel's findings and conclusions with respect to these charges.

While the Hearing Panel accepted most of Judge Holloway's evidence over that of the JQC with respect to these charges relating to her deposition testimony, the Hearing Panel nevertheless misapplied these facts and accepted

Special Counsel's misrepresentations as to the law on deposition testimony and the use of errata sheets in reaching its erroneous conclusion. If the law were properly applied under these circumstances, the inescapable conclusion would be that Judge Holloway did not violate any Judicial Canon with respect to her deposition testimony and preparation of an errata sheet. It is for this reason that Judge Holloway once again requests that this Court re-consider the Motion to Dismiss, Motion for Summary Judgment and Motion for Directed Verdict that were previously ignored by the JQC Panel and dismiss Charges 3, 4, and 5 on the basis that they are legally insufficient, or, in the alternative, disregard the Findings made by the Hearing Panel.

C. **THE PANEL'S RECOMMENDATION OF GUILT FOR THE CHARGE RELATING TO CONTACT WITH JUDGE ESSRIG SHOULD BE DISREGARDED BY THIS COURT.**

The Panel's findings on this charge are inconsistent and should be rejected by this Court. Judge Essrig testified that she would have granted this scheduling favor to anyone who had asked.[50] As such, if the favor would have

[50] Findings of Fact, p. 11. "Judge Essrig felt the request was innocuous and would have been a common occurrence had it been made by a lawyer or a party." See also Essrig Testimony, HT 389:21-390:12; HT 393:18-21; HT 394:11-16.

been granted whether asked for by a party, the relative of a party, an attorney, or anyone else, there is no way that Judge Holloway's position as a judge was misused to obtain some benefit for her brother, and the charge then is legally insufficient and should have been dismissed.

The Panel appears to focus its guilt finding on the speculation that others might have heard the request being made of Judge Essrig and that Judge Essrig was concerned that others had heard the request. If the scheduling request would have been granted to anyone, then it was not improper for Judge Holloway to make the request, and whether a hundred people heard the request or no one heard it is of no consequence. Even if this Court disagrees and believes that it is relevant whether someone heard the request, Special Counsel had the burden to prove by clear and convincing evidence that someone had in fact overheard the request. Special Counsel, however, did not put on a single witness to provide this testimony.

On the other hand, there were five independent witnesses that testified relating to this issue during the defense case in chief. The Hearing Panel has completely disregarded the testimony of three attorneys,[51] Marie Folsom (Judge

[51] Pines Testimony, HT 607-609; N. Brooks Testimony, HT 609-611; Pippinger Testimony, HT 611-614.

Essrig's Judicial Assistant),[52] and Angela Martin (Judge Essrig's bailiff),[53] all of whom testified that they were present on that date, would have heard the request if it was made in the outer offices of Judge Essrig's chambers, but did not in fact hear any request being made of Judge Essrig. The fact that Judge Essrig recalls being in a different place in the office at the time of the request, in contradiction to the testimony of five independent witnesses, cannot be reconciled in the fashion chosen by the Hearing Panel.

While this Court generally relies upon the Hearing Panel to evaluate the truth and veracity of witnesses, it cannot do so in this instance. The Hearing Panel, once again, has failed to even comment on the testimony of any witness other than Judge Essrig with respect to this charge. Further, the Hearing Panel has made no effort to explain to this Court why the Panel has chosen to ignore the weight of the testimony. The JQC has failed to prove this charge by clear and convincing evidence and the Hearing Panel has failed to provide this Court with any findings of fact that would support its conclusion.

C. **THIS COURT SHOULD REJECT THE FINDINGS OF THE PANEL ON THE STIPULATED CHARGE RELATING TO CONTACT WITH STODDARD TO THE EXTENT THAT CONFLICTS IN THE TESTIMONY ARE BEING HELD AGAINST RESPONDENT.**

---

[52] HT 509:13-20; 512:5-25.

[53] HT 515:12-516:25.

Since Judge Holloway had already admitted to the improper contact and agreed to stipulate to the charges as to that contact, it was wholly improper for the Chairman of the Hearing Panel to permit more than 25% of the trial to rehash these allegations. The Chairman of the Hearing Panel summarily dismissed Judge Holloway's objections to this cumulative and salacious testimony.[54]

The fundamental fairness of these proceedings has been undermined by permitting this evidence to be presented at all. Once again, the JQC has been given the upper hand in proceedings where all of the advantages, if any, should be in favor of the accused. Judge Holloway has admitted since the inception of these proceedings that her contact with Judge Stoddard and statements were inappropriate. She has apologized profusely both privately and in public for her conduct. The Panel did note that Judge Holloway had admitted this charge, but, nevertheless, noted that the evidence was "in sharp conflict" and "in striking dispute."[55] This evidence was permitted for only one purpose, to

---

[54] HT 53:13.

[55] Judge Holloway is somewhat puzzled by these statements by the Hearing Panel. The only issue with respect to the stipulated charges that was in dispute was the contention by Special Counsel and Mark Johnson that Judge Holloway's contact with Judge Stoddard was the sole cause for his recusal (Judge Stoddard himself disputed this contention) and that the child remained in shelter status for an extended period of time due to Judge Holloway's conduct. The Hearing Panel, however, made the specific finding that Judge Holloway was not responsible for the child remaining in shelter status, presumably in light of the hearing transcripts from the custody proceeding

poison the Panel against Judge Holloway with respect to other charges, and that is exactly what happened.

D. **THIS COURT SHOULD COMPLETELY DISREGARD THE PANEL'S SUGGESTION OF GUILT AS TO THE CONTACT WITH YARATCH SINCE JUDGE HOLLOWAY'S CONDUCT VIOLATED NO ETHICAL CANNON.**

Judge Holloway is significantly troubled that the Hearing Panel would find her guilty of this charge, when it has resolved all of the factual issues in her favor. Furthermore, the Hearing Panel indicated that ordinarily "this charged conduct would not warrant discipline under the Code of Conduct governing judges." The Hearing Panel further found that Judge Holloway's conduct was consistent with the contact with law enforcement and Bar authorities that were the subject of the McMillan and Frank JQC proceedings and found to be appropriate and ethical in those cases.

Nevertheless, and quite stunningly, the Hearing Panel found Judge Holloway guilty of this charge in the light of the "overall context of this case and in view of the other closely related charges." In essence, the Hearing Panel has concluded that this conduct should not be the subject of discipline for any

---

provided to the Hearing Panel that showed that this contention was absolutely false and one that the JQC should have never made since it was unsupported any competent evidence.

judge or even the subject of JQC charges, except in the instance of Judge Holloway since she has done some other things wrong and therefore even her proper conduct is now improper.

This is a charge that should have never been filed by the JQC. It was legally insufficient when first brought and the facts have not changed since the inception of these proceedings. Given the lack of facts supportive of the charge, the Hearing Panel has chosen to insert its own facts to help the JQC, and has opined that it believes Judge Holloway was "in fact attempting to influence Detective Yaratch to act in a manner which would be favorable to her friend Robin Adair's side of the case." First of all, there is **no** evidence to support this statement. Even Detective Yaratch admits that he did not believe that Judge Holloway was trying to influence him or his investigation, which is consistent with Judge Holloway's testimony.[56] Further, Detective Yaratch was conducting two investigations at the time: an investigation of an abuse complaint filed by the child's teacher and an investigation of whether the mother of the child should be charged for encouraging the child to make false claims relating to sexual abuse. It is inconceivable that the Hearing Panel would even attempt to misconstrue Judge Holloway's concerns for a young child and that the

[56] Yaratch Testimony, HT 338:20 – 339:17.

investigation be handled quickly as an attempt to help the child's mother, who, given the charges, had as much to lose (or perhaps more given Detective Yaratch's testimony) as Mark Johnson once the investigation was completed.

The illogical findings of the Hearing Panel on this charge make it abundantly clear that the Hearing Panel has made a valiant effort to try to salvage this case for the JQC, its Special Counsel and the Investigative Panel. In its effort to find Judge Holloway guilty of the disputed charges, the Hearing Panel has ignored even facts presented by the JQC. Also, the findings of the Hearing Panel on this charge also exemplify the results of the Chairman of the Hearing Panel permitting cumulative evidence and allowing the JQC to try charges to which there had been a stipulation. The Hearing Panel admits that the proverbial well had been poisoned when it commented that Judge Holloway's "single phone call to the detective would not warrant discipline if it were not a part of the entire unfortunate series of events." Either the charged conduct is inappropriate or it is not. The fact that there are other charges or allegations of improper conduct is absolutely irrelevant in determining guilt on any particular charge. Judge Holloway was never charged with an ethical violation because of a pattern of conduct.

E. THIS COURT SHOULD REJECT THE PUNISHMENT RECOMMENDATIONS OF THE PANEL AS THEY ARE EXCESSIVE AND UNJUSTIFIED.

The objective of a disciplinary proceeding against a judge is not to "inflict punishment but to determine whether the one who exercises judicial power is unfit to hold a judgeship."[57] Accordingly, if this Court subsequently determines that Special Counsel has met its burden of establishing by clear and convincing evidence the charged allegations, the Court must then decide whether the proven charges merit the punishment recommended by the Hearing Panel.

The allegations, by themselves or considered together, do not support the Hearing Panel's recommendation of a public reprimand and the unprecedented recommendation of a thirty-day suspension. Rather, when the allegations are considered in conjunction with Judge Holloway's distinguished and exemplary history of service to the bench and the community, the absence of any prior disciplinary transgression, and the nature of the allegations in comparison with prior JQC determinations, it is clear that an admonishment or, at worst, a public reprimand is the appropriate sanction.

In In re Fowler,[58] the Florida Supreme Court noted the Commission's finding that "while public confidence was eroded by [the judge's] conduct, the erosion [was] minimized by his prior exemplary and otherwise unblemished record on the bench and community service." Similarly, Judge Holloway has established that she is a valued and respected member of the Thirteenth Judicial Circuit judiciary and her community. Judge Holloway called the following three witnesses to provide testimony concerning her good

---

[57] In re Miller, 644 So. 2d 75, 78 (Fla. 1994) (quoting In re Kelly, 238 So. 2d 565, 569 (Fla. 1970)).

[58] 602 So. 2d 510, 511 (Fla. 1992).

character: Hillsborough County Circuit Judge J. Rogers Padgett, Second District Court of Appeal Judge Chris W. Altenbernd, and Reverend James A. Harnish.

Judge Padgett, who has served as a judge in Hillsborough County for twenty-seven years, testified that he has seen approximately 200 judges come and go in this circuit and that, in his experience, Judge Holloway is one of the best.[59] Judge Padgett further testified that Judge Holloway is not a volatile person and that he has never heard of her involvement in any incident similar to her transgression with Judge Stoddard.[60]

Judge Altenbernd testified that before Judge Holloway took the bench, she had a reputation as being a professional trial lawyer.[61] Judge Altenbernd explained that in his review of transcripts in which she was the presiding judge, he could not recall ever identifying any inappropriate or non-judicial conduct and has determined that Judge Holloway has shown good judicial judgment and is a valued member of the judiciary.[62] Judge Altenbernd also described Judge Holloway's participation with their children's little league team, and stated that Judge Holloway was a good leader in the community.[63]

Reverend Harnish testified that Judge Holloway and her family are active members of the Hyde Park United Methodist Church.[64] Reverend Harnish described Judge Holloway as being part of a very strong family with a deep commitment to each other and to their faith.[65] He recounted the very high level of trust and confidence of his congregation in Judge Holloway, the Judge's deep passion for the welfare of children, and her demonstration of great compassion and care for others in their church.[66]

Judge Holloway has submitted a compilation of affidavits as an exhibit at the hearing. The affidavits demonstrate a unanimous opinion of respect and admiration for Judge Holloway by people throughout the judicial system. Besides attesting to Judge Holloway's good judicial demeanor and fairness to both sides, the

---

59 HT 577:10-17.
60 HT 576:19-577:3.
61 HT 672:2-673:21.
62 HT 676:2-678:15.
63 HT 674:7-675:12.
64 HT 617:19-618:24.
65 HT 619:15-23.
66 HT 621:11-622:10.

affidavits also demonstrate the isolated nature of Judge Holloway's improper contact with Judge Stoddard. After consideration of this character witness testimony, Judge Holloway's value to this community as a leader and her continued ability to effectively act as a circuit court judge cannot be questioned.

It must be acknowledged that Judge Holloway did everything in her power to enforce the stipulation entered into between herself, Special Counsel and the Chairman of the JQC, to avoid the necessity of a full evidentiary proceeding. Moreover, Judge Holloway accepted personal responsibility for her conduct toward Judge Stoddard and stipulated to the allegations concerning her contact with Judge Stoddard. Judge Holloway's acknowledgment of the wrongfulness of her actions should be considered by this Court in recommending the appropriate sanction.[67] In particular, Judge Holloway has expressed deep remorse for her behavior and had previously apologized both telephonically and in person to Judge Stoddard. Judge Holloway's husband (C. Todd Alley), her friend (Cynthia Tigert), and the mother of P.A (Robin Adair), all testified that Respondent had immediately recognized the wrongfulness of her actions and regretted what she had done.

In determining the appropriate sanction, the Hearing Panel should have considered prior Florida Supreme Court judicial disciplinary decisions. The Court has repeatedly imposed only a public reprimand for far more egregious conduct than the violations found by the Hearing Panel in this case. The Court has determined that a public reprimand was appropriate for cases which involved, among other misconduct: misrepresentations made under oath, misrepresentations to the public through campaigning, and misrepresentations to law enforcement officers during official investigations.[68] Although each of these cases involved knowing and intentional deceptions, something the Hearing Panel specifically found had **not** occurred in this case, the Court still determined that a public reprimand was the appropriate sanction. The Court has also imposed public reprimands for a judge's abusive and demeaning conduct toward lawyers, litigants and witnesses.[69] Certainly, if a public reprimand appropriately sanctions judges who abuse parties in a subordinate

---

[67] See In re Schwartz, 755 So. 2d 110, 113 (Fla. 2000).

[68] See In re Frank, 753 So. 2d 1228 (Fla. 2000); In re Alley, 699 So. 2d 1369 (Fla. 1997); In re Fowler, 602 So. 2d 510 (Fla. 1992).

[69] See In re Schwartz, 755 So. 2d 110 (Fla. 2000); In re Wood, 720 So. 2d 506 (Fla. 1998); In re Wright, 694 So. 2d 734 (Fla. 1997); In re Steinhardt, 663

position, an admonishment or a public reprimand is sufficient to sanction a judge whose behavior is directed at a fellow judge, a person fully capable of protecting himself and who did not himself lodge the complaint of misconduct. The Court has also issued public reprimands for judges whose abuse of power resulted in the deprivation of liberty.[70] In these instances, the judge's misconduct attacked the heart of the judicial system, and, yet, the Court determined after full and deliberate consideration that a public reprimand was commensurate with the offenses.

The only case in which the Supreme Court has approved the suspension of a judge involved much more egregious conduct than that found by the Hearing Panel in this case. In In re Wilson, this Court approved a stipulated settlement between the Investigative Panel and Judge Wilson that called for a public reprimand and ten-day suspension.[71] The conduct of the judge which led to this stipulation included public intoxication, witnessing a crime, failing to report a crime, attempting to hinder law enforcement, and lying to law enforcement concerning knowledge that a crime had taken place. This conduct is so far beyond that found to be violations by the Hearing Panel in this case that one can only conclude that the punishment recommended by the Hearing Panel is so punitive due to Judge Holloway's inability to initially settle the case with the Investigative Panel and her continued insistence that the JQC play by the rules.

Finally, the Hearing Panel has recommended that this Court assess costs against Judge Holloway for these proceedings. Apparently, the JQC rules do not permit Judge Holloway to seek similar recompense, which is probably why so few judges choose to stand up for themselves and fight frivolous charges.

So. 2d 616 (Fla. 1995); In re Golden, 645 So. 2d 970 (Fla. 1994); In re Trettis, 577 So. 2d 1312 (Fla. 1991).

[70] See In re Graziano, 661 So. 2d 819 (Fla. 1995); In re Perry, 641 So. 2d 366 (Fla. 1994); In re Colby, 629 So. 2d 120 (Fla. 1993).

[71] 750 So. 2d 631 (Fla. 1999).

Judge Holloway has endured nearly two years of investigations and prosecutions. She has been the subject of incredible media scrutiny, much of it due to leaks by the JQC during the time period prior to the filing of charges. Her friends, family, and colleagues have been subjected to numerous interviews and missions to "dig up dirt." On numerous occasions, she attempted to settle these charges but was rebuffed by factions of the JQC more concerned with winning than doing what was right. And just what did that prosecution achieve?

The JQC wasted nearly one-fourth of the trial proving up charges to which Judge Holloway stipulated. Should Judge Holloway have to pay for those costs? Special Counsel spent months conducting discovery relating to a second phone call with Detective Yaratch (which never took place), and forced Judge Holloway to prepare until the morning of trial to defend against this baseless charge. Should Judge Holloway also pay for those expenses? Special Counsel convinced the Investigative Panel to find probable cause on the tree incident without a single written witness statement and then elicited false testimony at trial before dismissing the charge. Are those expenses that Judge Holloway should have to pay for as well? And finally, Judge Holloway was willing to stipulate to the remaining charges in order to resolve the case. However, the JQC (or at least some part of the JQC) refused this agreement and forced Judge Holloway to proceed to trial, so that the JQC could end up

proving even less than what the judge had already agreed to admit. Yet, the Hearing Panel believes that it is Judge Holloway who should pay for this needless waste of resources.

In any other context, a party would have recourse to dismiss frivolous charges, to enforce settlements, to sanction those who negotiate in bad faith, to obtain summary judgment or dismissal of legally insufficient charges, to know that all exculpatory evidence would be presented, and to obtain recompense for prosecutorial misconduct. Judge Holloway would ask this Court to discard completely the Hearing Panel's appalling suggestion that Judge Holloway be forced to pay any costs relating to these proceedings. In addition, Judge Holloway would urge this Court, once again, to reform the JQC process to give accused judges the same procedural safeguards that are afforded other litigants who have been wrongly accused, subjected to bad faith investigations and prosecutorial misconduct, and who have been forced to expend hundreds of thousands of dollars needlessly to defend baseless charges.

IV. **CONCLUSION**

At the start of this trial, Special Counsel informed the Hearing Panel that the evidence presented would "outline a disturbing series of facts and incidents" that would show "a judge that is out of control."[72] While those quotes certainly made for juicy headlines for the television and newspaper coverage, they had no relevance to the case actually presented by Special Counsel. What did Special Counsel really offer the Hearing Panel? What did the Hearing Panel ultimately find? The "series of facts and incidents" ended up being essentially one event (perhaps two at most) -- the contact with Judge Stoddard and

---

[72] JQC Opening Statement, HT 22:14-24.

Detective Yaratch and testimony related to those contacts. The fact that the charges were broken up into nonsensical subparts, such as separating the deposition testimony from the errata sheet, does not suddenly turn this into a pattern of misconduct. Furthermore, the most significant portion of these charges, Judge Holloway's contacts with Judge Stoddard and her salacious comments, were admitted.

There were two other "incidents" that Special Counsel at least initially contended were the evidentiary support to show some horrific pattern of abuse that negates Judge Holloway's distinguished twelve-year tenure on the Bench. One of these "incidents" (the tree injunction) did not have the evidentiary weight to even survive the two-day trial, and was dismissed by Special Counsel before all rebuttal testimony as to that incident could be heard. As to the contact with Judge Essrig, this event was so innocuous even Special Counsel finally admitted (somewhat apologetically) at the close of this case that this charge "looks kind of weak."[73]

This case is not about a "judge out of control." [74] It is not about a "disturbing series of incidents and facts."[75] This case is about an unfortunate (and much regretted) lapse of judgment that resulted in contact with Judge Stoddard, and a judge who stands ready to accept her punishment for that lapse. This case is about a Judge who perhaps cared too much about the welfare of a four-year old child when allegations were made that this child was sexually abused by her father. This case is about a judge who refused to look

---

73 JQC Closing Argument, HT 829:18.
74 JQC Opening Statement, HT 22:24.
75 JQC Opening Statement, HT 22:14.

the other way while a child was injured by the system. This is the case of a judge who did her very best to testify truthfully despite trying circumstances. This is a case about a judge who was prosecuted because she refused to retreat when faced with a formidable opponent. She refused to step down because of her undying conviction that refusing to fight or agreeing to admit a wrong that she did not commit would in itself be dishonest. And it is for this reason that Judge Holloway implores this Court to thoroughly evaluate the evidence; to delve into just what evidence the Special Counsel presented and what evidence was not presented; to carefully examine the factual findings of the Hearing Panel and the applicable law which does not support many of these charges; to ponder the reasonableness of Judge Holloway's actions with respect to the deposition testimony; and to fully evaluate the credibility, motives, and biases of the witnesses, especially those upon whom so much of the Special Counsel's case relied. After careful inquiry into these matters, the only conclusion is that Special Counsel has failed to prove anything other than the improper contact with Judge Stoddard, a charge that was admitted since the inception of these proceedings, and this Court should find in favor of Judge Holloway as to all the remaining charges and disregard the findings and recommendations of the Hearing Panel. Finally, Judge Holloway's conduct is not comparable to the misconduct set forth above and should result at best in an admonishment.

Respectfully submitted,

_____

Scott K. Tozian, Esq.
SMITH & TOZIAN, P.A.
109 North Brush Street, Suite 150
Tampa, Florida 33602
Tel.: (813) 273-0063
Fax: (813) 221-8832

Michael S. Rywant, Esq.
RYWANT, ALVAREZ, JONES,
RUSSO & GUYTON
109 N. Brush Street, Suite 500
Tampa, Florida 33602
Tel.: (813)229-7007
Fax.: (813)223-6544

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail or Federal Express this day of February, 2002, to Beatrice A. Butchko, Esq., Special Counsel, One Biscayne Tower, Suite 2300, 2 South Biscayne Blvd., Miami, Florida 33131.

By:

Scott K. Tozian, Esq.
Counsel for Respondent

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Response to Show Cause Order complies with the font requirements of Rule 9.210, Fla. R. App. P.. The font use in this matter is Times New Roman 14.

By:

Scott K. Tozian, Esq..

Counsel for Respondent